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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On January 26, 1998, this Court granted certiorari to review the Eighth Circuit's decision, arising from this same review proceeding, limiting the jurisdiction of the Federal Communications Commission (FCC) to issue rules implementing the "local competition provisions" (47 U.S.C. 251 *et seq.*) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. See *FCC* v. *Iowa Utilities Board*, No. 97-831, and related cases. On January 22, 1998, the Eighth Circuit issued a writ of mandamus, ostensibly to "enforce the mandate" of its earlier decision, limiting the FCC's distinct authority to make substantive determinations central to the eligibility of the Bell Operating Companies to enter the long-distance telephone market under 47 U.S.C. 271. The question presented here is whether that mandamus order is consistent with the Commission's obligation to make the long-distance eligibility determinations required by Section 271 and is properly within the scope of the Eighth Circuit's jurisdiction.

PARTIES TO THE PROCEEDINGS

The petitioners are the Federal Communications Commission and the United States of America.

This petition seeks review of an order arising from the same underlying proceedings as the order challenged in *AT&T Corp.* v. *Iowa Utilities Board*, cert. granted, No. 97-826 (Jan. 26, 1998). The parties to these proceedings are listed in the appendix to the petition for a writ of certiorari in that case at 1a-4a, 73a-78a, 92a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States and the Federal Communications Commission (FCC or Commission), petitions for a writ of certiorari to review the writ of mandamus issued by the United States Court of Appeals for the Eighth Circuit in this case on January 22, 1998. This Court granted certiorari on January 26, 1998, to review the principal opinions issued by the court of appeals in the same case. See *FCC* v. *Iowa Utilities Board*, No. 97-831, and related petitions.

OPINIONS BELOW

The mandamus order and the accompanying opinion of the court of appeals (App., *infra*, 1a-20a) are not yet reported, but can be found at 1998 WL 30655. An earlier opinion of the court of appeals, on which the mandamus order is based, is reported at 120 F.3d 753, and is printed in the appendix to the petition for certiorari (97-826 Pet. App.) in *AT&T Corp.* v. *Iowa Utilities Board*, cert. granted, No. 97-826 (Jan. 26, 1998), at 1a-67a. The other

opinions issued in the underlying review proceeding are noted at 97-831 Pet. 1-2. The FCC's order in *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC No. 97-298 (Aug. 19, 1997) (excerpts printed at App., *infra*, 21a-34a), is unreported, but can be found at 1997 WL 522784. We have lodged 15 copies of that order with the Clerk of this Court.

JURISDICTION

The court of appeals issued a writ of mandamus and an accompanying order on January 22, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and, in the alternative, on 28 U.S.C. 1651(a).

STATUTORY PROVISIONS INVOLVED

Sections 271 and 402(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, are printed in the appendix to this petition (App. 35a-50a). Other relevant provisions of the 1996 Act appear at 97-826 Pet. App. 93a-130a. In referring to the provisions of the 1996 Act, we have cited the 1996 Supplement to the United States Code.

STATEMENT

On January 26, 1998, this Court granted certiorari to review the Eighth Circuit's decision in *Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (1997) (*Local Competition Decision*). See Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141. The *Local Competition Decision* greatly restricts the FCC's jurisdiction to issue rules implementing the provisions of the Telecommunications Act of 1996 (47 U.S.C. 251 *et seq.*) that are designed to open

local telephone markets to full competition.[1] On January 22, 1998, ostensibly to "enforce the mandate" of its earlier decision, the court of appeals issued a writ of mandamus severely limiting the FCC in the exercise of its authority to determine whether the Bell Operating Companies have met certain key conditions for full entry into the long-distance market. See 47 U.S.C. 271 (reprinted at App. 35a-48a). That mandamus order, which the Eighth Circuit issued just four days before this Court granted certiorari to review the *Local Competition Decision*, is the subject of this petition.

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In the 1970s, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service.

The consent decree prohibited the Bell Companies themselves, however, from providing long-distance service. See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 186 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). They were permitted to provide telephone service "only between points within a

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[1] The statutory background and procedural posture of this case are discussed at greater length in our petition for certiorari in *FCC* v. *Iowa Utilities Board*, cert. granted, No. 97-831 (Jan. 26, 1998).

single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Electric Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993).[2] In approving that restriction, the district court overseeing the consent decree explained that a Bell Company, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities to impede long-distance competition in two principal ways: it could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *American Tel. & Tel. Co.*, 552 F. Supp. at 187-188, 223.

2. The Telecommunications Act of 1996 transformed the regulation of all telephone markets, to open local markets to competition for the first time and to enhance the competition that had proliferated in the long-distance market after the 1984 divestiture. To understand how the Act affects the long-distance market, however, it is first necessary to review how it alters regulation of local markets. See also 97-831 Pet. 2-8.

a. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress entitled potential competitors to enter the local market by using the incumbent monopo-

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[2] To implement the decree's restriction on the provision of long-distance services, the district court divided the Bell Companies' collective geographical regions into more than 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Electric Co.*, 569 F. Supp. 990 (D.D.C. 1983). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." (Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the Bell Companies to carry.) Most, but not all, inter-LATA calls cross state boundaries. In 1996, interstate inter-LATA calls accounted for approximately 73% of all inter-LATA call minutes. See FCC, *Preliminary Statistics of Communications Common Carriers*, Table 2.6 (1996).

list's own network in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires incumbent local exchange carriers (LECs)[3] to "interconnect" their networks with those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. Second, Section 251(c)(3) gives potential competitors a right to gain "unbundled access" to elements of an incumbent LEC's network: *i.e.*, to lease individual network elements (*e.g.*, telephone wires, switching capability, etc.) at separate prices, which also must be "just, reasonable, and nondiscriminatory." Finally, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users.

A separate provision, 47 U.S.C. 252, sets forth the procedures that individual entrants and incumbent LECs must follow when implementing those core requirements of Section 251. Section 252 provides for a period of negotiation between incumbents and new entrants, followed by expeditious arbitration by state public utility commissions of any unresolved issues.[4] Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in such agreements to federal standards: to "the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."

With particular respect to arbitration of open *rate* issues, Section 252(c)(2) provides that, in addition to the re-

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[3] A number of incumbent LECs, particularly those that serve small and mid-size markets, were independent of the Bell System before the decree and are today unaffiliated with any Bell Company. Nonetheless, the Bell Companies—along with GTE, which has acquired many "independent" LECs in recent years—are by far the largest incumbent LECs in the United States. Collectively, the Bell Companies provide nearly 80% of local telephone service in the United States.

[4] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. 252(e)(5).

quirements of Section 251, rates for interconnection under Section 251(c)(2) and unbundled elements under Section 251(c)(3) must be "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)" and "may include a reasonable profit," 47 U.S.C. 252(d)(1). Section 252(d)(3) provides that the "wholesale rates" charged to resellers under Section 251(c)(4) must be based on retail rates, excluding the portion of those rates attributable to "costs that will be avoided." And Section 252(d)(2) sets forth a reciprocal compensation scheme for transport and termination of telephone traffic. All agreements approved or arbitrated by state commissions are subject to review in federal district court—and not in any state court—to determine whether they "meet[] the requirements" of Sections 251 and 252. See 47 U.S.C. 252(e)(4) and (6).

b. As part of a comprehensive legislative package that breaks down barriers to competition in all telecommunications markets, the 1996 Act also sets forth a procedure, codified in 47 U.S.C. 271, under which the Bell Companies may seek authorization from the FCC to provide, for the first time, the long-distance services that the 1982 consent decree had prohibited them from offering. See Pub. L. No. 104-104, Tit. VI, § 601(a)(1), 110 Stat. 143 (superseding decree); *United States* v. *Western Electric Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. Apr. 11, 1996).

With limited exceptions not applicable here, Section 271 bars a Bell Company from providing long-distance services originating in its "in-region" States—*i.e.*, the States in which it has traditionally exercised monopoly power over local service—unless it first applies for, and receives, authorization from the FCC to do so. See 47 U.S.C. 271(a) and (b)(1). The FCC may grant such an authorization only if "it finds" that the Bell Company has satisfied the requirements of a "competitive checklist" designed to open

the Bell's own local exchange markets to fair competition (see 47 U.S.C. 271(c)(2)); that the Bell Company will conduct its long-distance operations in accordance with the structural separation requirements set forth in 47 U.S.C. 272; and that granting the application would serve "the public interest, convenience, and necessity." 47 U.S.C. 271(d)(3).[5]

Among the requirements on the checklist are "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)"; "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)"; "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)"; and the availability of telecommunications services "for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. 271(c)(2)(B)(i), (ii), (xiii) and (xiv). Section 271 thus bars

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[5] Congress anticipated that, in many but not all cases, potential new entrants will have sought to enter a Bell Company's market under Sections 251 and 252 before the Bell Company has filed an application under Section 271. Congress thus provided for two different scenarios under which a Bell Company may seek to demonstrate its compliance with the substantive requirements of the checklist: either by (*inter alia*) "enter[ing] into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities," 47 U.S.C. 271(c)(1)(A), or, if no new entrant "has requested the access and interconnection described in subparagraph (A)" within a certain time period, by ensuring that "a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f)," 47 U.S.C. 271(c)(1)(B). With respect to the first scenario, the Commission may not grant a Section 271 application "unless it finds that * * * [the Bell Company] has fully implemented the competitive checklist." 47 U.S.C. 271(d)(3)(A)(i). With respect to the second scenario, the Commission may not grant the application "unless it finds that * * * [the] statement offers all of the items included in the competitive checklist." 47 U.S.C. 271(d)(3)(A)(ii).

the FCC from granting a Section 271 application unless "it finds," among other things, that the Bell Company has complied with "the requirements" of Sections 251(c) and 252(d), including (for example) the standards that those provisions impose for the rates of interconnection, unbundled access, and resale. See pp. 5-6, *supra*.

Congress directed the FCC both to "consult with the Attorney General" before ruling on a Section 271 application and to "give substantial weight to the Attorney General's evaluation" of the application. 47 U.S.C. 271(d)(2)(A); see pp. 22-23, *infra*. By contrast, while Congress directed the Commission to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements" of the checklist, it did *not* require the Commission to give any particular weight, or any weight at all, to the state commission's views on the merits of the application. 47 U.S.C. 271(d)(2)(B). The Commission must either approve or deny a Section 271 application within 90 days of its receipt. 47 U.S.C. 271(d)(3). Congress conferred a right of judicial review on "any * * * person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application" under Section 271, and it gave the District of Columbia Circuit exclusive jurisdiction to hear such suits. 47 U.S.C. 402(b)(6) and (9) (reprinted at App. 49a-50a).

3. Section 251(d)(1) directs the Commission, within six months of the Act's passage, to complete "all actions necessary to establish regulations to implement the requirements" of Section 251. 47 U.S.C. 251(d)(1). Accordingly, on August 8, 1996, the Commission issued its First Report and Order implementing the local competition provisions of the new Act. See *In re Implementation of Local Competition Provisions of the Telecommunications Act of*

1996, 11 FCC Rcd. 15,499 (1996) (First Report and Order) (lodged with this Court in No. 97-826; excerpts printed in 97-826 Pet. App. 131a-337a).

The Commission first determined that Congress had given it statutory authority to set general standards for implementing, among other things, the Act's core rate provisions: *e.g.*, the provisions requiring incumbent LECs to permit interconnection with their networks, and to provide unbundled access to network elements, at "just, reasonable, and nondiscriminatory" rates, 47 U.S.C. 251(c)(2) and (3), which must be "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)," 47 U.S.C. 252(d)(1). In light of that language, the Commission concluded that, to ensure competition in local markets, the rates for interconnection and access to unbundled network elements should be based on economic (*i.e.*, forward-looking) costs rather than on the "embedded costs" reflected on the ratemaking accounting books. See First Report and Order ¶ 620. In brief, the forward-looking cost methodology adopted by the Commission—"total element long-run incremental costs"—asks what it would cost to construct and operate an efficient telephone network today, and it creates a framework for setting prices for network elements on that basis. See *ibid.* The Commission's approach would preserve for the state commissions the complex and important task of applying that methodology to establish actual carrier-to-carrier rates in light of carrier-and region-specific variables such as geography, population density, and so forth. See 97-831 Pet. 15-16.

On July 18, 1997, the Eighth Circuit issued its *Local Competition Decision*, vacating extensive portions of the First Report and Order on jurisdictional grounds, including the portions dealing with pricing issues. Among other things, the court held that Sections 252(c)(2) and (d)

give state commissions exclusive authority to interpret the pricing terms of Sections 251 and 252 and implicitly deny the Commission any rulemaking role in that area. 97-826 Pet. App. 10a-14a. The court did not, however, consider the substance of the Commission's determination that, to comply with the Act, rates must be based on forward-looking costs. Nor, of course, did it address the Commission's distinct authority to adjudicate Bell Company long-distance applications under Section 271, a question that was not before it. As noted above, this Court granted certiorari on January 26, 1998, to review, among other things, the jurisdictional holding of the *Local Competition Decision*.

4. On May 21, 1997, Ameritech Corporation—a Bell Company providing local exchange service in several midwestern States—filed a Section 271 application to provide in-region long-distance service in Michigan. On August 19, 1997, the FCC denied the application. *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC No. 97-298 (*Ameritech Order*) (15 copies lodged with this Court; excerpts printed at App. 21a-34a). The Commission determined that Ameritech had failed to satisfy at least three checklist requirements: interconnection, access to "operations support systems," and nondiscriminatory access to 911 and E911 services. *Ameritech Order* ¶¶ 128-279; see 47 U.S.C. 271(c)(2). The Commission also found that Ameritech had failed to demonstrate compliance with certain structural and transactional requirements imposed by 47 U.S.C. 272. *Ameritech Order* ¶¶ 344-373.

Because it denied the application on those grounds, the FCC did not finally decide another set of questions that had been presented: "whether Ameritech's pricing of

checklist items complies with the requirements of section 271." App. 21a-22a. Nonetheless, because several parties had sought guidance on a variety of issues, including pricing, the Commission took the opportunity to examine the general content of the checklist requirements, in the hope that "this discussion will help expedite Ameritech's entry into long distance in Michigan and the entry of the other [Bell Companies] into the in-region interLATA market by providing more guidance as to what showing is required in future applications to demonstrate full compliance with the checklist." *Id.* at 22a.

The Commission concluded that, to perform its "exclusive responsibility" under Section 271 "for determining whether a BOC has in fact complied with the competitive checklist," it "must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination, and resale in accordance with the pricing requirements set forth in Section 252(d)." *Id.* at 23a. The FCC acknowledged that, in the *Local Competition Decision*, the Eighth Circuit had held that the Commission lacks statutory authority to issue national rules implementing the pricing terms of the local competition provisions. App. 23a-24a. The Commission noted, however, that the Eighth Circuit had "made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based." *Id.* at 24a. The Commission also observed that, whether or not it has jurisdiction to issue binding regulations implementing the pricing provisions of Sections 251 and 252 for purposes of specific interconnection agreements, no reasonable understanding of the statutory scheme could foreclose it from interpreting those provisions when adjudicating Section 271 applications. *Id.* at 24a-28a.

As the Commission explained, if the *Local Competition Decision* is permitted to stand, the meaning of the Act's

pricing terms will be determined over the course of many years, in piecemeal federal court litigation under 47 U.S.C. 252(e)(6); throughout that period, however, the Bell Companies will file Section 271 applications that the FCC must approve or deny within 90 days after their receipt. App. 24a-25a; see 47 U.S.C. 271(d)(3). Because nothing in Section 271 remotely suggests that "the Commission's bases for determining checklist compliance should * * * vary throughout the country," the FCC concluded that it "must apply uniform principles to give content to the cost-based standard in the competitive checklist for each * * * section 271 application." App. 26a-27a. And, the Commission added, "even if it were decided that we lacked authority to review [Bell Company] prices as an aspect of our assessment of checklist compliance under section 271(d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C)." *Id.* at 28a. Finally, on the substance of the pricing issues, the Commission determined that, in any future Section 271 application, Ameritech or any other Bell Company must demonstrate that its prices for interconnection, unbundled elements, and transport and termination are based on forward-looking, rather than embedded, costs. *Id.* at 28a-30a.

5. Neither Ameritech nor any other party appealed the *Ameritech Order* to the D.C. Circuit, which, as noted, has exclusive appellate jurisdiction to review Section 271 orders. Instead, in September 1997, the Bell Companies returned to the Eighth Circuit, joined by their trade association, a group of state commissions, and the National Association of Regulatory Utility Commissioners. They claimed that the passages of the *Ameritech Order* addressing the Commission's authority to interpret the content of Section 271's "competitive checklist" violated the

"mandate" of the Eighth Circuit's *Local Competition Decision*.

On January 22, 1998, the Eighth Circuit granted the motions to enforce the mandate and issued a writ of mandamus that substantially controls the substance of the Commission's orders under Section 271. Specifically, the Eighth Circuit ordered the Commission "to confine its pricing role under section 271(d)(3)(A) to determining whether applicant [Bell Companies] have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such [Bell Companies] seek to provide in-region, inter-LATA services." App. 2a; see also *id.* at 15a (rejecting any Commission "attempt to utilize section 271(d)(3)(C)" to resolve pricing issues). The court reasoned that, in interpreting the scope of its authority under Section 271, the FCC had improperly "reassert[ed] the vacated pricing rules by imposing them as conditions for entry by the Bell Operating Companies into the in-region, interLATA telecommunications business." *Id.* at 8a.

The Eighth Circuit then turned to the question of its own jurisdiction to review this matter. It acknowledged that 47 U.S.C. 402(b) gives the D.C. Circuit exclusive jurisdiction to review Commission orders granting or denying Section 271 applications. App. 18a. The court held, however, that it could sidestep that jurisdictional constraint by crafting "a forward-looking remedy" that would "leave the FCC's Ameritech Order untouched." *Id.* at 19a. That remedy, the court declared, does no more than "enforce our mandate in order to disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated in paragraphs 280-297 of the [Ameritech] Order." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Eighth Circuit issued this mandamus order four days before this Court granted certiorari to review the Eighth Circuit's *Local Competition Decision*. While the mandamus order purports to do no more than "enforce the mandate" of the *Local Competition Decision*, it in fact adds an immense new obstacle to the FCC's implementation of the most important telecommunications legislation since 1934. The *Local Competition Decision* bars the Commission from issuing rules governing many of the core federal rights of new entrants to enter *local* telephone markets; the mandamus order now impairs the Commission's authority to make the statutory determinations that Congress directed it to make before granting or denying a Bell Company's application to enter the *long-distance* market. As discussed below, that order is irreconcilable with the language of Section 271 and with congressional intent; if left intact, it would compound the competitive uncertainties already created by the court's *Local Competition Decision*; and, by exerting control over present and future Section 271 proceedings, the Eighth Circuit improperly entered a specialized field that Congress quite deliberately assigned to the exclusive jurisdiction of the D.C. Circuit.

Although a reversal of the jurisdictional holding in the *Local Competition Decision* would, of itself, require invalidation of the mandamus order, an affirmance of that jurisdictional holding would cure neither the Eighth Circuit's independently erroneous reading of Section 271 nor its lack of jurisdiction to address the Commission's orders under that provision. For the reasons discussed below, we believe that the most appropriate course would be for this Court to grant this petition and consolidate its review of the mandamus order with the other issues that it has already agreed to review in this same case. At a minimum,

the Court should hold this petition pending completion of its review of the *Local Competition Decision*.

1. a. The language of Section 271, which the mandamus order scarcely addresses, could not be clearer in granting the FCC exclusive authority to determine a Bell Company's eligibility for entry into the long-distance market. First, Section 271 directs "the Commission" to grant a Bell Company's application only if "it finds," *inter alia*, that a Bell Company has "fully implemented" (or, in certain special circumstances, has offered to implement) all of the requirements of the competitive checklist. 47 U.S.C. 271(d)(3); see p. 7, *supra*. Those requirements include "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" and "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. 271(c)(2)(B)(i), (ii).

The Commission's plenary authority to "find" whether or not a Bell Company has satisfied those statutory "requirements" necessarily encompasses the authority to interpret, in the first instance, what those requirements *are*: to determine, for example, whether a Bell Company has in fact met the "requirements" of Sections 251(c)(3) and 252(d)(1) if it charges new entrants for unbundled elements based on its own embedded costs rather than on forward-looking economic costs. The Eighth Circuit's approach, however, would transfer that basic interpretive authority from the FCC to the 50 state commissions. It would assign to each of those commissions—with potentially radical state-by-state differences in both methodology and outcome—basic aspects of "find[ing]" whether or not a Bell Company has complied with Sections 251(c) and 252(d). That approach is flatly inconsistent with the language of Section 271(d)(3)(A).

The Eighth Circuit's approach is likewise inconsistent with the Commission's independent textual obligations under Section 271(d)(3)(C), the "public interest" provision. Under that provision, even if the Commission "finds" formal compliance with the checklist, it may grant a Section 271 application only if it also "finds that * * * the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. 271(d)(3)(C). Congress framed that public-interest inquiry with deliberate breadth. Before granting a Section 271 application, the Commission must consider, among a range of issues, the extent to which a Bell Company's local market is open to genuine competition and whether the Bell Company's own provision of long-distance services in its in-region States would preserve fair competition in the long-distance market. Because pricing issues play an important role in those inquiries, the Eighth Circuit's mandamus order—which, without explanation, bars the Commission from "utiliz[ing] section 271(d)(3)(C)" to intrude on what the court deems the States' "intrastate turf" (App. 14a-15a)—frustrates the Commission's statutory obligation, before granting an application, to "find" that Bell Company entry into the long-distance market would serve the public interest.

The Eighth Circuit's approach is also irreconcilable with the provisions of Section 271 addressing the respective roles of the Justice Department and the state commissions in the process of adjudicating Bell Company applications. Congress instructed the Commission to "consult with the Attorney General" on any such application *and* to "give substantial weight to the Attorney General's evaluation," while nonetheless making clear that "such evaluation shall not have any preclusive effect on any Commission decision." 47 U.S.C. 271(d)(2)(A). The joint statutory responsibilities of the FCC and the Justice

Department in this context reflect the federal government's historically central role—before and after adoption of the 1982 consent decree that led to the breakup of the Bell System—in overseeing the relationship between the Bell Companies' monopoly power in local markets and the development of fair competition in the long-distance market. See pp. 3-4, *supra*.

That relationship, however, has not been a subject of similar regulatory concern to the state commissions. Accordingly, Section 271 gives them a more limited role than the Justice Department in the application process, imposing on the Commission a procedural obligation to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of [the checklist]." 47 U.S.C. 271(d)(2)(B). In striking contrast to the provision of the immediately preceding subsection, which invests the Attorney General's views with "substantial weight," Section 271(d)(2)(B) does *not* require the Commission to give *any* particular weight—much less dispositive weight, as the Eighth Circuit would have it—to a state commission's legal evaluation of the Bell Company's claims of compliance with Sections 251(c) and 252(d)(1).

At bottom, the Eighth Circuit's mandamus order holds that, even though Congress directed the Commission to give "substantial weight" to the Attorney General's analysis but not to any views offered by the state commissions, the Commission must, at the same time, give core aspects of a state commission's analysis the kind of "preclusive effect" that Congress specifically withheld from any analysis offered by the Attorney General. That is illogical. Under the only sensible interpretation, Section 271 imposes on the Commission the unremarkable responsibility, before "find[ing]" that a Bell Company has met the "requirements" of the checklist, to interpret in the first

instance what those requirements are; and, before "finding] that * * * the requested authorization is consistent with the public interest," to determine, with unfettered analysis, what the public interest demands.

Finally, the Eighth Circuit's position misreads not just Section 271 itself, but also the most basic jurisdictional premise of federal telecommunications law. Congress created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. 151. It authorized the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," 47 U.S.C. 152(b), which "apply to *all* interstate and foreign communication by wire or radio," 47 U.S.C. 152(a) (emphasis added). In short, Congress gave the FCC plenary authority to regulate, among other things, interstate telecommunications. By assigning dispositive weight to each state commission's legal interpretation of core checklist provisions, however, the Eighth Circuit has thwarted the Commission's long-established authority to regulate the quintessential interstate telecommunications market: the market for long-distance calls, the clear majority of which are interstate calls. See note 2, *supra*, and note 6, *infra*; see also *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

Nothing in the 1996 Act authorizes that dramatic shift in interstate regulatory authority from the federal government to the States. To the contrary, the Act confirms precisely the opposite: that the federal government retains exclusive authority in this area. And, even if there were some conceivable ambiguity on that issue, the Commission's resolution of that ambiguity would be entitled to judicial deference, for "it is settled law that the rule of deference applies even to an agency's interpretation of its

own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment).

The Eighth Circuit, however, ignored all of these issues. In defense of its order, it explained only that the FCC may not "accomplish indirectly" through Section 271 what the court barred it from doing "directly" under Sections 251 and 252. See App. 14a-15a.[6] That reasoning boils down to the following syllogism: (1) the August 1997 *Local Competition Decision* divested the Commission of jurisdiction to issue rules implementing the pricing provisions of Sections 251 and 252; (2) the Commission's interpretation of Section 271 would nonetheless permit the Commission to construe those pricing provisions for the specific purpose of adjudicating Bell Company long-distance applications; and (3) that interpretation must therefore be rejected to accommodate the *Local Competition Decision*.

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[6] In one passage, the court of appeals held that impairing the Commission's authority over interstate telecommunications in this context is necessary to "fence[] off intrastate matters from FCC regulation"—a result required, in the court's view, by Section 2(b) of the original Communications Act of 1934, 47 U.S.C. 152(b). See App. 14a-15a; see generally 97-831 Pet. 17-22 (discussing Section 2(b)). But, even apart from the other flaws in the court's reasoning (discussed in the text), it is settled that conflicts between state regulation of intrastate matters and the FCC's regulation of interstate matters must be resolved in favor of the latter; in particular, federal law supersedes any exercise of state regulation that would "prevent[] [the FCC] from discharging its statutory duty * * * to regulate interstate communication." *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036, 1045 (4th Cir.), cert. denied, 434 U.S. 874 (1977); see also *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355, 375 n.4 (1986); *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 112-116 (D.C. Cir. 1989). The Eighth Circuit's adoption of the contrary proposition—that federal regulation of interstate matters must yield to inconsistent state regulation of intrastate matters—deepens the conflict, first created by the *Local Competition Decision*, between the Eighth Circuit and the Fourth and D.C. Circuits on the meaning and effect of Section 2(b). See 97-831 Pet. 19-22.

As an initial matter, we dispute the Eighth Circuit's assumption that the Commission's implementation of Section 271 is irreconcilable with the holding of the *Local Competition Decision*. See pp. 27-28, *infra*. The deeper problem with the court's logic, however, is that Section 271 says, and means, precisely what the Commission construed it to mean. Any tension between that meaning and the *Local Competition Decision* is evidence not that Section 271 means something other than what it says, but that the *Local Competition Decision* was wrong. As we discuss below, that is one important reason why this Court should review the mandamus order at the same time that it reviews the *Local Competition Decision*, so that it may consider all relevant aspects of this interrelated statutory scheme at once.

b. On a practical level, the mandamus order, if left intact, would severely disrupt the federal scheme governing the entry of the Bell Companies into the long-distance market, just as the *Local Competition Decision* has already encumbered the process of bringing competition to local markets.

In that earlier decision, the Eighth Circuit construed the 1996 Act to grant each of the 50 state commissions plenary authority to interpret the federal pricing standards of Sections 251(c) and 252(d)(1) for purposes of resolving specific carrier-to-carrier interconnection disputes under Section 252. That holding, which this Court will review next Term, would permit the 50 state commissions to disagree with one another on such basic methodological issues as whether interconnection rates should be based on forward-looking economic costs or on an incumbent carrier's embedded costs. Those disagreements about the meaning of federal law would persist until, after many years of piecemeal litigation under 47 U.S.C. 252(e)(6) (see p. 6, *supra*), the federal courts have

settled on nationally consistent interpretations of the 1996 Act's central substantive provisions. As we have elsewhere explained, we do not believe that Congress intended to subject new entrants and the federal courts to that dilatory and exceptionally litigious regime; instead, in our view, Congress directed *the Commission* to address the most basic controversies arising under the local competition provisions by August 1996 so that those controversies could be consolidated in a single review proceeding and resolved soon thereafter. See 96-831 Pet. 22-24.

The mandamus order, however, has added a new dimension to the jurisdictional disarray originally created by the *Local Competition Decision*. By compelling the FCC to accept each state commission's peculiar pricing methodology when adjudicating Section 271 applications, the mandamus order requires the Commission *itself*—and no longer just the 50 state commissions—to reach inconsistent decisions on central interpretive issues arising under the Act, at least until the lengthy process of Section 252(e)(6) litigation has run its course. For example, if one state commission interprets the Act to confine rates for unbundled elements to forward-looking economic costs and another interprets it to permit recovery of embedded costs, those two state commissions would often disagree about whether a Bell Company's rates meet "the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. 271(c)(2)(B)(ii). Where the outcome of a Section 271 application turns on compliance with those provisions, the mandamus order compels the Commission to reach different and incompatible results on identical facts, depending on the pricing methodology favored by the particular State in which the application arises; that inconsistency, in turn, could expose the Commission to charges of arbitrary and capricious decisionmaking.

Moreover, insofar as the mandamus order compels the FCC to accept not just each state commission's methodological choices but also each state commission's specific arbitration decisions, it could require the Commission to approve Section 271 applications despite serious questions about the Bell Company's compliance with any plausible understanding of either the checklist requirements or the public interest. The Commission could presumably be compelled, for example, to rubber-stamp any interconnection pricing policy upheld by a state commission, no matter how cursory the state commission's pricing analysis may be, and no matter how objectively clear it may be that the prices themselves would foreclose meaningful competition in local markets or even threaten fair competition in the long-distance market.[7] In fact, that rubber-stamp approval process could create an anomalous comparative advantage, which Congress surely never intended, for Bell Companies operating in States whose public utility commissions engage in less careful pricing reviews.

Finally, the Eighth Circuit made no effort to square the effects of its mandamus order with the express statutory role either of the Attorney General in recommending dispositions of Section 271 applications or of the D.C. Circuit in reviewing those dispositions. First, the mandamus

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[7] That could be so even if a carrier adversely affected by the original state commission finding seeks federal district court review of that finding under Section 252(e)(6). Section 271(d)(3) requires the Commission to adjudicate a Bell Company application within 90 days of its filing, and the resolution of any parallel proceeding under Section 252(e)(6) would generally not come until much later. The Eighth Circuit's ruling, moreover, creates the following anomaly: Whenever a district court *does* invalidate a state commission's pricing methodology as inconsistent with the Act, Section 271(d)(6) would require the Commission to reconsider, and perhaps revoke, its earlier order approving any application predicated on that methodology, because the Bell Company would have "ceased to meet [one] of the conditions required for such approval." 47 U.S.C. 271(d)(6).

order does not bind the Attorney General. Indeed, Section 271(d)(2)(A) explicitly authorizes the Attorney General, in her evaluation of each application, to employ "any standard [she] considers appropriate." As part of a comprehensive competition analysis—which focuses on whether local markets in the relevant States are fully and irreversibly open to competition—the Justice Department has advised the Commission, among other things, to employ a forward-looking cost methodology when reviewing Section 271 applications, because that approach best promotes fair competition in this context. *E.g.*, Evaluation of the United States Dep't of Justice, *In the Matter of Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, 35-39 (Nov. 4, 1997). To the extent that the Department's analysis is inconsistent with a state commission's analysis, however, the mandamus order would compel the Commission to disregard the former—no matter how persuasive it may be—and thereby violate the Commission's own statutory obligation to "give substantial weight to the Attorney General's evaluation." 47 U.S.C. 271(d)(2)(A). Congress did not intend to place the Commission in that untenable position or to make the Attorney General's role meaningless. As Sections 271(d)(2)(A) and (B) make clear, the Commission need not give any particular weight, much less dispositive weight, to the analysis of the state commissions in this area.

The Eighth Circuit's mandamus order also cannot bind the D.C. Circuit, to which Congress assigned the exclusive role of reviewing the Commission's adjudication of Section 271 applications. In reviewing those applications, the D.C. Circuit will be asked, under traditional principles of administrative law, to enforce the Commission's statutory responsibility to make a variety of independent determinations about a Bell Company's entitlement to enter the

long-distance market. Because the mandamus order compels the Commission to abdicate much of that responsibility to the 50 state commissions, and because the D.C. Circuit would be unlikely to view that abdication as appropriate, the Commission could be faced with two mutually contradictory mandates: one issued by the court of appeals to which Congress gave exclusive jurisdiction over Section 271 orders, see 47 U.S.C. 402(b)(6) and (9), and the other issued by the Eighth Circuit, acting—as we next explain—beyond the scope of its jurisdiction. This Court should intervene now to foreclose that indecorous conflict before it arises.[8]

2. Apart from its invalidity on the merits, the mandamus order should be vacated for the independent reason that the Eighth Circuit was without jurisdiction to issue it. Despite that court's insistence that it had somehow left the *Ameritech Order* "untouched," App. 19a, there is simply no denying that the mandamus order reviews and condemns the content of the *Ameritech Order*, invests that condemnation with the force of law, and—just as important—exerts direct coercive control over the content of all of the Commission's Section 271 orders in the future. The content of such orders, however, is a matter that the Eighth Circuit has no lawful authority to address.

As we have discussed, the roles that Congress assigned to the FCC and the Justice Department in evaluating Section 271 applications reflect the federal government's traditional responsibility for overseeing the relationship, before and after the 1984 divestiture, between the Bell Companies' monopoly control over local markets and the

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[8] Review petitions challenging unrelated FCC orders denying Section 271 applications are now pending in the D.C. Circuit. See *SBC Communications Inc.* v. *FCC*, No. 97-1425 (argued Jan. 9, 1998); *BellSouth Corp.* v. *FCC*, No. 98-1019 (to be argued Sept. 25, 1998). Those cases will not require the D.C. Circuit to address the basic issues presented here.

development of competition in the long-distance market. Congress relied on similar considerations of institutional expertise in choosing the D.C. Circuit as the exclusive forum for review of "any order of the Commission granting or denying any application" under Section 271. 47 U.S.C. 402(b)(6) and (9). Until the 1996 Act superseded the AT&T consent decree, that court exercised appellate jurisdiction over all aspects of the decree's implementation and, in the process, developed a unique familiarity with the complex legal and economic issues arising in this area.

In exerting control over the content of the Commission's Section 271 orders, therefore, the Eighth Circuit's preemptive strike ignores Congress's deliberate decision to consolidate review of all Section 271 orders in the one court of appeals that, in Congress's view, is institutionally best equipped to address them.[9] The Eighth Circuit cannot justify that expropriation of adjudicatory power as somehow necessary to enforce the mandate of the *Local Competition Decision*. Whether that earlier decision has preclusive effects on the Commission's Section 271 decisions is one issue; the proper forum for adjudicating disputes about the nature and extent of those effects, however, is quite another. The D.C. Circuit is entirely

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[9] Other courts of appeals have broadly construed the scope of the D.C. Circuit's exclusive jurisdiction over the matters addressed in 47 U.S.C. 402(b), which gives that court exclusive jurisdiction to review enumerated categories of FCC orders. For example, the courts have recognized the D.C. Circuit's exclusive jurisdiction to review a variety of FCC decisions that do not themselves fall within a specific category of order reserved for the D.C. Circuit's review under Section 402(b) but that are nonetheless "ancillary to" or "in aid of" the FCC's authority to issue such orders. See, *e.g.*, *WHDH, Inc.* v. *United States*, 457 F.2d 559, 561 (1st Cir. 1972); *Cook, Inc.* v. *United States*, 394 F.2d 84, 87 (7th Cir. 1968). Here, however, the Eighth Circuit's mandamus order is inappropriate for the simpler reason that the FCC order it reviewed falls squarely *within* a category of order that Congress has explicitly assigned to the exclusive province of the D.C. Circuit.

competent, when exercising its exclusive statutory jurisdiction under Section 271, to give the *Local Competition Decision* any preclusive effect it may be due. And, except in extraordinary circumstances not applicable here, mandamus is wholly inappropriate "as a mode of review where a statutory method of appeal has been prescribed." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943); see also *In re Sindram*, 498 U.S. 177, 179 (1991) (per curiam); *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988).[10]

Moreover, for a mandamus order to be a valid exercise of authority under the All Writs Act, 28 U.S.C. 1651(a), the case that it affects must "be one that may lie within the prospective future jurisdiction of the court of appeals, *or* that has in fact come within its jurisdiction in the past." 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and*

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[10] There is no substance to the Eighth Circuit's accusation that, by announcing Section 271 principles prospectively in the course of adjudicating a Section 271 application, the Commission has "attempt[ed] to forum-shop" and has sought "another bite at the apple in the District of Columbia Circuit." App. 18a. It is Congress, not the Commission, that chose the D.C. Circuit as the exclusive forum for review of Section 271 orders; and it is respondents, not the Commission, that went shopping for a different forum. There is similarly no merit to the Eighth Circuit's efforts to justify its involvement in the Section 271 process on the theory that the relevant portion of the *Ameritech Order* may be "unreviewable on direct appeal" in the D.C. Circuit. *Ibid.* To provide guidance to the telecommunications industry, that portion of the order adopts criteria for the adjudication of Section 271 applications, and it defines the rights and responsibilities of the Bell Companies in this context. Under 47 U.S.C. 402(b)(6) and (9), any party that is in any way "aggrieved" or "adversely affected" by the *Ameritech Order* could have sought review in the D.C. Circuit, but none did. In any event, any ripeness concerns the Eighth Circuit may have had concerning reviewability in the D.C. Circuit would of course apply as well to mandamus review in the Eighth Circuit. If the D.C. Circuit were powerless to review issues concerning the FCC's statutory authority until presented with a Section 271 application whose outcome turned on those issues, the same ripeness considerations would also bar the Eighth Circuit from short-circuiting the Section 271 process by adjudicating those issues before then.

Procedure § 3932, at 471 (2d ed. 1996) (emphasis added); see also *id.* at 477 ("a court of appeals could not issue a writ to a district court sitting in another circuit, *nor to any other tribunal properly reviewable only in another circuit*") (emphasis added); *Ojeda Rios*, 863 F.2d at 204-205; *Telecommunications Research and Action Center* v. *FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984). The *Ameritech Order* and the Commission's future Section 271 orders, however, are obviously separate cases from the local-competition rulemaking proceeding that the Eighth Circuit did have jurisdiction to review; they are cases *that have never been and can never be* in the Eighth Circuit. A court may not properly enforce its mandate in one case by issuing mandamus to influence the course of a *different* case falling within a category of cases over which another court has been given *exclusive* statutory jurisdiction. Indeed, there is no obvious limiting principle that would keep the Eighth Circuit, now that it has strayed this far into the exclusive jurisdiction of other courts, from issuing writs of mandamus whenever it dislikes some aspect of an FCC opinion that, in the Eighth Circuit's own view, may be in tension with the *Local Competition Decision*. But that is not a proper role for the Eighth Circuit to play, and this mandamus order was not a proper exercise of judicial power.

3. If this Court were to reverse the jurisdictional holding of the *Local Competition Decision*, it would follow *a fortiori* that the mandamus order should be vacated, because that order explicitly rests on the Eighth Circuit's earlier jurisdictional holding. For that reason, this Court should, at a minimum, hold this petition pending review of the *Local Competition Decision*. But, even if this Court were to affirm the Eighth Circuit's earlier jurisdictional holding, it would *not* follow that the mandamus order is valid, and this Court's review of that order would still be

needed. First, as discussed above, Section 271 squarely requires the Commission to interpret the pricing terms of Sections 251(c) and 252(d), and to address the public interest, for the limited purpose of adjudicating Bell Company applications to enter the long-distance market. That statutory mandate is not contingent upon the scope of the Commission's distinct authority to issue national guidelines directly governing interconnection agreements between any LEC and any carrier seeking entry into local markets. Second, and in any event, this Court's review of the *Local Competition Decision* could not cure the fatal jurisdictional defect in the Eighth Circuit's issuance of mandamus to review an order that Congress assigned to the exclusive province of the D.C. Circuit.

In sum, this Court's review of the *Local Competition Decision* will not necessarily resolve the independently certworthy question presented in this petition. We therefore urge the Court to grant this petition, permit the parties to file briefs on the question presented here, and consolidate its review of the mandamus order with its review of the *Local Competition Decision*. For several reasons, that course is preferable to holding this petition pending this Court's review of the rest of this case.

First, unlike most petitions that this Court holds pending disposition of other cases that it has agreed to review, this petition arises from an order *in the same case* as the petitions that this Court has already granted. It is only because the Eighth Circuit chose to wait for four months —until literally the day before the Conference at which this Court, as previously announced, considered our petition in No. 97-831 (see 118 S. Ct. 683 (1998))—that we could not include a challenge to the mandamus order in that petition. See 97-831 Pet. 11 n.4.

As a general matter, it would be uneconomical for this Court to review two related orders in the same case dur-

ing separate judicial Terms. That is particularly true in this case, because the mandamus order rests on the explicit premise that the scope of the Commission's Section 271 authority is inextricably related to the scope of its authority to issue general rules implementing Sections 251 and 252. Whether or not that premise is valid, review of the *Local Competition Decision* alone will inevitably require the Court to consider the relationship between those two aspects of this statutory scheme. For example, petitioner MCI has argued, and we agree, that the Commission's exclusive authority to make the findings necessary to adjudicate Section 271 applications strongly suggests that Congress intended for the Commission to issue rules implementing the pricing provisions of Sections 251 and 252. See 97-829 Pet. 14, 29; see also pp. 19-20, *supra*. Review of the mandamus order on the merits would thus require this Court to expend little additional effort.

Second, holding this petition pending resolution of the rest of this case could forestall the Court's review of the question presented here until October Term 1999, thereby perhaps postponing a decision on the merits until the year 2000. That delay would come at a time when the telecommunications industry needs more, not less, certainty about the complex of legal rights and responsibilities created by the 1996 Act. The volume of Section 271 applications is likely to increase during the next several years, and the issues presented here will be integral both to the Commission's compulsory 90-day adjudication of those applications and to the D.C. Circuit's subsequent review. Until this Court intervenes on the merits, parties aggrieved by the Commission's compliance with (and interpretation of) the mandamus order will predictably seek a variety of emergency remedies from the D.C. Circuit, perhaps from the Eighth Circuit, and ultimately from this Court, raising essentially the same issues presented here.

In our view, it would be preferable for this Court to resolve those issues sooner, in this general review proceeding, rather than later, in the context of piecemeal emergency litigation.

Finally, while mandamus is always an "extraordinary" remedy, *In re Sindram*, 498 U.S. at 179, this particular mandamus order is more extraordinary than most. The Eighth Circuit has entered a regulatory area that Congress specifically reserved for the expertise of another court, and, in so doing, it has thrown a complex statutory scheme into procedural disarray. That unprecedented and improper exercise of judicial power warrants this Court's prompt attention.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should consolidate its review of the question presented in this petition with its review of the questions presented in the petitions for certiorari in No. 97-831 and related cases. In the alternative, the petition should be held pending review of this Court's decision in No. 97-831 and related cases.

Respectfully submitted.

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MARCH 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321, 3406, 3410, 3414,
3416, 3418, 3424, 3430, 3436,
3444, 3450, 3453, 3460, 3507,
3519, 3520, 3603, 3608, 3696,
3708, 3709, 3756, 3901, 3906, 3982

IOWA UTILITIES BOARD, PETITIONER,
BELL ATLANTIC CORPORATION, ET AL.,
INTERVENORS ON APPEAL

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENTS

Filed: January 22, 1998

WRIT OF MANDAMUS

Before: BOWMAN, WOLLMAN, HANSEN, Circuit Judges.

To The Federal Communications Commission:

In accordance with the order of the United States Court of Appeals for the Eighth Circuit herein delivered, the Federal Communications Commission is hereby ordered to obey the Court's October 14, 1997,

mandate in Appeal No. 96-3321, *Iowa Utilities Board v. Federal Communications Commission.* The Federal Communications Commission is ordered to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271 as the Court's decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) requires. It is further ordered that the Federal Communications Commission cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d) of the Act. The Federal Communications Commission is ordered to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services.

It is so ordered.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321, 3406, 3410, 3414,
3416, 3418, 3424, 3430, 3436,
3444, 3450, 3453, 3460, 3507,
3519, 3520, 3603, 3608, 3696,
3708, 3709, 3756, 3901, 3906, 3982

IOWA UTILITIES BOARD, PETITIONER,
BELL ATLANTIC CORPORATION, ET AL.,
INTERVENORS ON APPEAL

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENTS

Submitted: January 15, 1998
Filed: January 22, 1998

ORDER ON MOTIONS FOR
ENFORCEMENT OF THE MANDATE

Before: BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

I.

Several petitioners have filed motions requesting this court to issue and enforce our mandate in the case of *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th

Cir.1997).[1] On October 14, 1997, after granting motions for panel rehearing, we amended our July 18, 1997, decision and issued the mandate. *See id.* at 813 (replacing Section II(G)(1)(f)); *id.* at 818 n.38 (clarifying scope of vacatur); *id.* at 819 n. 39 (clarifying scope of vacatur). We expressly reserved jurisdiction over the petitioners' motions to enforce the mandate. Today, following oral argument on the motions, we address that issue.

One of the core holdings of our July 18, 1997, decision was that the Federal Communications Commission (FCC) has no jurisdiction to issue pricing regulations for interconnection, unbundled access, resale, and transport and termination of local telecommunication services under section 252(d) of the Telecommunications Act of 1996.[2] We held that the Act vests exclusive authority to establish the pricing requirements of this section in the state commissions, and we vacated the FCC's pricing regulations

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[1] Petitions for writs of certiorari have been filed and are currently pending before the Supreme Court. *See AT&T Corp. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 17, 1997) (No. 97-826); *MCI Telecomm. Corp. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 18, 1997) (No. 97-829); *Association for Local Telecomms. Servs. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 18, 1997) (No. 97-830); *FCC v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-831); *Ameritech Corp. v. FCC*, 66 U.S.L.W. 3459 (U.S. Dec. 24, 1997) (No. 97-1075); *GTE Midwest Inc. v. FCC*, 66 U.S.L.W. 3459 (U.S. Dec. 30, 1997) (No. 97-1087); *US West Inc. v. FCC*, 66 U.S.L.W. 3459 (U.S. Jan. 5, 1998) (No. 97-1099); *Southern New England Tel. v. FCC*, —— U.S.L.W. —— (U.S. Jan. 8, 1998) (97-1141).

[2] The Telecommunications Act of 1996 (the Act) is codified in Volume 47 of the United States Code. We refer to it throughout by reference to the applicable section number. "Section 252(d)," for example, denotes 47 U.S.C. § 252(d).

in which the FCC purported to arrogate that power to itself. Today we hold that the FCC violated this central tenant of our decision when it issued its Ameritech Michigan Order of August 19, 1997.[3] Because that portion of the Ameritech Order which offends our decision is, in our view, an advisory opinion of the FCC, we need not review the FCC's denial of Ameritech's application or even determine whether we have jurisdiction to do so. Rather, Petitioners request and we grant prospective relief in the form of a writ of mandamus. Specifically, we direct the clerk of this court to issue a writ of mandamus ordering the FCC to abide by our mandate and to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies regarding the pricing of interconnection, unbundled access, resale, and transport and termination of local telecommunications traffic. For reasons which we explain, it has no authority to do so under section 271(d)(3)(A) or section 271(d)(3)(C) of the Act.

II.

A. The Mandate

In our July 18 decision, we held in the clearest possible terms that the state commissions have exclusive jurisdiction to regulate the prices that incum-

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[3] *See In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, FCC 97-298, 1997 WL 522784 (Aug. 19, 1997) (memorandum opinion and order denying application of Ameritech Michigan pursuant to section 271, as amended, to provide in-region, interLATA services in Michigan) (petitions for recon. pending) [hereinafter *Ameritech Order*].

bent local exchange carriers (LECs) may charge their competitors for access to the incumbent LECs' local telephone network facilities. After a detailed analysis of sections 251 and 252 of the Act, we concluded that "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." *Iowa Utils. Bd.*, 120 F.3d at 796. Elsewhere we wrote that

> the terms of the Act clearly indicate that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state-pricing rules regarding the local competition provisions of the Act. Because the Act clearly grants the states the authority to set the rates for interconnection, unbundled access, resale, and transport and termination of traffic, the FCC has no valid pricing authority over these areas of new localized competition for the states to negate. . . . [S]ubsections 252(c)(2) and 252(d) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions[.]

Id. at 798-799 (internal citations omitted). In short, our decision made very clear that "Congress did not envision the FCC's participation in determining the prices that the incumbent LECs will be able to charge for opening their networks to new entrants." *Id.* at 795. We held that in promulgating regulations purporting to govern the types of pricing systems state commissions were to adopt, the FCC had exceeded its statutory authority and violated the plain meaning of the 1996 Federal Communications Act. Accordingly, we vacated the national pricing rules that the FCC had promulgated.

B. The FCC's Ameritech Order

We filed our *Iowa Utils. Bd.* decision on July 18, 1997. On August 19—scarcely one month later—the FCC made clear its intention to disregard those portions of our decision with which it disagreed. It did so in the memorandum opinion and order which it issued denying Ameritech Michigan's application to provide in-region interLATA services in Michigan. In that opinion, the FCC reasserted its authority to do precisely what we held in *Iowa Utils. Bd.* it had no power to do. It asserted that it had the authority to interpret section 252(d) of the Act, and it adopted a policy which will coerce state commissions to adopt its vacated TELRIC-based pricing rules for implementation of the local competition provisions of the Act in spite of our order.

The Ameritech Order denied Ameritech's application for authorization under section 271 of the Communications Act of 1934, as amended, to provide in-region, interLATA services in the State of Michigan. It denied the application because it found that Ameritech had failed to satisfy section 271's competitive checklist's requirements of access to its operations support systems, interconnection, and access to its 911 and E911 services. Finding these three failures to be dispositive, the FCC determined that it need not and would not address whether Ameritech had satisfied the other requirements of the competitive checklist. *See Ameritech Order* ¶¶ 5-6, 280-81. Specifically, it "[did] not reach the question of whether Ameritech's pricing of checklist items complies with the requirements of section 271[.]" *Id.* ¶ 281. Thus, paragraphs 280-297, wherein the FCC reasserts its authority to establish the prices for the local competi-

tion provisions, do not address the merits of Ameritech's application, but instead constitute an advisory opinion. The FCC explained its issuance of such an opinion by stating that it sought to provide guidance as to what showing would be required in future applications to demonstrate full compliance with the checklist. *Id.* ¶¶ 6, 281.

It is not for us to address the propriety of the FCC's issuance of an important policy statement in an advisory opinion separate from the merits determination of a section 271 order. Rather, our inquiry is limited to the question of whether the issuance of this particular advisory opinion and its content constitute a violation of our mandate. It clearly does. The FCC admits in paragraph 283 that "the Eighth Circuit has held that the Commission lacks jurisdiction to issue national rules establishing a methodology by which the states determine the rate for interconnection, unbundled network elements, resale, and transport and termination in state-arbitrated interconnection agreements pursuant to section 252." Inexplicably, it then proceeds to establish just such a methodology, stating that the cost-based standard of § 252(d) is contained in a federal statute and is "therefore[] presumed to have a uniform meaning nationwide." *Id.* ¶ 286. This attempt to reassert the vacated pricing rules by imposing them as conditions for entry by the Bell Operating Companies into the in-region, interLATA telecommunications business does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do. The FCC cannot do in an advisory opinion in a ruling on a section 271 application that which we have expressly forbidden it from

doing in its rule-making procedure. A more clear violation of our mandate could hardly be imagined.

C. Section 252

Section 271(d)(3) requires the FCC to determine whether an applicant has implemented the competitive checklist of Section 271(c)(2)(B). Items (i), (ii), (xiii), and (xiv) of that checklist in turn require a Bell Operating Company (BOC) to provide interconnection, access to unbundled network elements, transport and termination, and resale prices that are "in accordance with" subsections (c) and (d) of section 252.[4] In other words, items (i), (ii), (xiii), and (xiv) of

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[4] 47 U.S.C. § 271(c)(2)(B), the Competitive Checklist, provides in relevant part:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.
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> * * *
>
> (xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.
>
> (xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

The FCC cites subsections (i), (ii), and (xiii) in support of its assertion of pricing authority. *See Ameritech Order* ¶¶ 292-93.

the competitive checklist do nothing more than incorporate by reference the specific requirements of sections 251 and 252. As discussed above, our July 18 decision clearly held that only the state commissions have the statutory authority to set prices under sections 251(c) and 252(d).

The FCC does not contest the fact that section 271(c)(2)(B) merely requires compliance with sections 251(c) and 252(d) of the Act, and it concedes that it "lack[s] authority to prescribe a national pricing methodology to implement the requirements of section 252(d)." *See id.* ¶ 284. Nonetheless, it engages in a lengthy discussion of its interpretation of section 252(d), *see id.* ¶¶ 282-294, and ends this discussion by concluding that subsections (i), (ii), and (xiii) of section 271(c)(2)(B) all require that the rates charged by the applicant BOC must be based on TELRIC principles. *Id.* ¶¶ 292-93. It clearly announces that it will not grant a section 271 application unless the rates are based on TELRIC principles. *Id.* In so doing, the FCC reinstates the substance of the pricing rules we vacated in our prior decision. In other words, in order to receive future FCC approval, a BOC will have to show that it prices its interconnection, unbundled access, resale, and transport and termination offerings under prices determined by the FCC's methodology. This violates our mandate. As discussed above, the very core of our holding was that the state commissions—not the FCC—have the exclusive authority to determine the pricing requirements of section 252(d).

We additionally discuss subsection (xiv) to clarify that nothing on the checklist could possibly be interpreted to grant such authority.

The FCC's justification for its reassertion of local pricing authority lacks even the scent of merit. It argues, in effect, that practical necessity requires it to violate the clear direction of this court. It writes:

> Because the Eighth Circuit concluded that the Commission lacked authority to prescribe a national pricing methodology to implement the requirements of section 252(d), if that decision stands, the meaning of section 252(d) ultimately will be determined through de novo review of state determinations by the federal district courts. The Act provides that parties aggrieved by state determinations under section 252 may sue in federal district court. Consequently, the district courts will review numerous interconnection agreements from some, if not all, of the states and the District of Columbia. The Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means. This litigation will take years, however, and inevitably will run the risk of impeding or significantly delaying the development of competition in the local exchange market, and, consequently, delaying the deregulation of the telecommunications markets that Congress envisioned.
>
> While the question of what constitutes cost-based pricing under section 252(d) wends it [sic] way through the courts, the Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard. The BOCs will file section 271 applications in the meantime, and the Com-

> mission is obligated by section 271 to issue a written determination approving or denying the authorization requested not later than 90 days after receiving an application.

Ameritech Order ¶¶ 284-85. The FCC uses this policy of expediency argument to justify its decision to flout this court's decision. However, the policy argument is both flawed and beside the point.

The FCC's policy argument is flawed because, counter to the assertion in paragraph 285 of the Ameritech Order, the FCC need not wait for the courts to review the state pricing regimes before it can apply them. Rather, the decisions of the state commissions are binding the moment they are issued. It is true that the pricing schemes established by the state commissions are appealable to the federal district courts by aggrieved parties, as Congress has directed. However, pending any such appeals, the pricing determinations of the state commissions constitute binding law. Thus, the parade of horribles described by the FCC will never arise. The FCC's role is, in fact, quite simple: It must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of the application. This can be done in part by simply asking the state commission whether the applicant BOC has complied with the state commission's pricing rules, as contemplated by section 271(d)(2)(B).[5] There will

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[5] The FCC is required to consult with the state commissions to verify the compliance of the BOCs with the checklist. *See* 47 U.S.C. § 271(d)(2)(B). We are not convinced by the FCC's argument that Congress intended section 271(d)(2)(B) to have no effect.

therefore be no occasion for the FCC to invent a requirement that pricing be done according to TELRIC principles. In fact, the FCC is expressly barred from limiting or extending the checklist "by rule or otherwise." *See* 47 U.S.C. § 271(d)(4).

The arguments advanced by the FCC are also beside the point. Notwithstanding its merits, a policy argument bottomed on an agency's view of expediency can never justify the agency's disregard of the existing mandate of a federal court in a case in which the agency was a party litigant. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). After a court has spoken, the FCC is bound to follow that court's mandate, because the FCC "is not a court nor is it equal to [a] court in matters of statutory interpretation." *Yellow Taxi Cab Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983). The FCC's disagreement with this court's decision is "simply an academic exercise that possesses no authoritative effect[,]" and in predicating its reassertion of pricing authority on its disagreement with this court's interpretation of section 252, the FCC "operate[s] outside the law." *International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 705 n.24 (D.C. Cir. 1987) (NLRB is bound by court's articulation of the law); *accord Taxi Cab Co. of Minnesota*, 721 F.2d at 382; *Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), *abrogation on other grounds recognized, St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1152 (1993). The

FCC is free to ask (and indeed has asked)[6] the Supreme Court to reverse our decision, and it is free to ask the Congress to give it the authority to regulate the intrastate pricing of the local competition provisions we have said it does not now have. But in the absence of reversal or Congressional amendment, the FCC may not reassert its interpretation of section 252(d) or reassert its purported authority to mandate TELRIC pricing schemes for the local competition provisions when our order so clearly denies it that authority.[7]

The FCC's attempt to continue to exercise pricing authority through section 271 is reminiscent of its earlier attempt to do so through section 208. We rejected that attempt in our prior decision. *See* 120 F.3d at 804. As we noted in our prior opinion, section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), as construed by the Supreme Court in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986), fences off intrastate matters from FCC regulation. *See Iowa Utils. Bd.*, 120 F.3d at 796-800. Where there is no unambiguous grant of intrastate authority to the FCC and the impossibility exception to section 2(b) does not apply, section 2(b) prevents "the FCC from intruding on the states' intrastate turf." 120 F.3d at 800. We held in our prior decision, and we reiterate today, that no section or subsection

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[6] *See* note 1.

[7] The FCC also argues that a uniform national pricing scheme would be easier to administer. *See Ameritech Order* ¶ 286. This additional expediency-based policy argument is similarly precluded by our clear mandate that, under the law, the state commissions have the exclusive authority to determine the price-setting mechanisms.

of the Telecommunications Act allows the FCC to break through that fence. We reject not only its attempt to utilize section 271(d)(3)(A), but also its attempt to utilize section 271(d)(3)(C) to accomplish this purpose. The FCC may not accomplish indirectly that which we have held it may not do directly.

D. Relief

The All Writs Act, 28 U.S.C. § 1651(a) (1994), gives federal courts the power to issue writs of mandamus. A federal court's power to utilize mandamus to enforce its prior mandate against an administrative agency is firmly established. *See City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (directing Federal Power Commission to come into compliance with the court's prior mandate); *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922-23 (D.C. Cir.) (remanding to district court for additional discovery and determination of whether Secretary of Labor's reimplementation of rules vacated by District of Columbia Circuit violated the mandate, and directing district court to issue writ of mandamus if Secretary's action did violate the mandate), *cert. denied*, 469 U.S. 820 (1984); *see also Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties."); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971) ("An appellate court likewise has continuing power to accept and pass upon a petition to clarify an outstanding mandate."), *cert. denied*, 406 U.S. 950 (1972). In *City*

of Cleveland, the District of Columbia Circuit explained:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. That approach, we have said, may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision. These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.

561 F.2d at 346 (internal quotations, alterations, and footnotes omitted).

We have not only the power, but also a duty to enforce our prior mandate to prevent evasion. *See American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982) ("Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus."), *cert. denied*, 460 U.S. 1022 (1983). Failure to clarify the mandate and direct future compliance where mandamus is the only adequate remedy would "reward bureaucratic misconduct and encourage judicial anarchy." *Department of the Navy v. Federal Labor Relations Auth.*, 835 F.2d 921, 923 (1st Cir. 1987).

The mandate doctrine is a specific application of the doctrine of law of the case. Our mandate encompasses "everything decided, either expressly or by necessary implication." *City of Cleveland*, 561 F.2d at 348 (internal quotations omitted). A federal court of appeals can use mandamus to preclude an agency from taking steps to evade the effect of its mandate, even if these steps were not expressly contemplated by the prior decision. For example, in *MCI Telecomm. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978), the District of Columbia Circuit was asked to enforce its mandate against the FCC and AT&T. The court conceded that AT&T's position was not explicitly precluded by the language of the prior decision, *see id.* at 595, but nonetheless granted mandamus-type relief, because it found that the FCC position was "clearly inconsistent with the basic themes of our [] decision" and "deliberately frustrates the purpose of the litigation . . . and the intended effect of our decree." *Id.* at 597; *see also id.* at 595.

Respondents correctly point out that this court declines to grant mandamus relief unless there is "no other adequate alternative administrative or judicial remedy." *See In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986). In *American Trucking Ass'ns*, the Fifth Circuit clarified that a remedy is not "adequate," if it unduly burdens the aggrieved party. It noted that repeated litigation in "scores of cases" might eventually lead to resolution of the matter before it, but held that this alternative remedy was not adequate. *See* 669 F.2d at 961; *see also Department of the Navy*, 835 F.2d at 923 (requiring substantial relitigation of issues already decided would not constitute adequate alternative remedy).

The FCC's choice to promulgate its policy decision not in rules or regulations, but rather in an advisory opinion appended to a section 271 order was, in our view, clearly calculated so as to evade ordinary appellate review. We are concerned that the advisory nature of the portion which contradicts our mandate may render it unreviewable on direct appeal. We are also concerned by the fact that the offensive portion of the FCC's Order has, by its own terms, nothing to do with the actual denial of Ameritech's application—we suspect that this naked policy statement was added to the Ameritech Order in an attempt to forum-shop. Having lost in its bid to usurp the power to determine intrastate prices in the Eighth Circuit, the FCC now seeks to have another bite at the apple in the District of Columbia Circuit.

This is the type of "evasion" that necessitates mandamus relief. The FCC's advisory opinion is clearly calculated to have a chilling effect on the state commissions' employment of non-TELRIC pricing schemes, and to do so in a way that avoids our review. It is a plain-faced reassertion of section 252(d) pricing authority over the local competition provisions of the Act by the FCC in clear violation of our mandate, and it therefore triggers our inherent jurisdiction to enforce our mandate.

Respondents argue that we can take no action with regard to the Ameritech Order, because jurisdiction over section 271 disputes is given exclusively to the District of Columbia Circuit. Although we have noted that the offensive portion of the Ameritech Order was not used as a reason for denying Ameritech's section 271 application, we conclude that we do not need to reach this question. The FCC specifically

stated that it was not deciding whether Ameritech had satisfied the requirements of section 252(d). The FCC was simply using the advisory portion of its order as a vehicle by which it could intimidate state commissions into complying with the substance of the rules we vacated in our July 18 decision. If this intimidation tactic is successful, a case or controversy will never arise to challenge its validity, because all states will be forced to adopt the FCC determined pricing schemes. The harm we wish to address is therefore entirely prospective: we seek to assure state commissions that the pricing authority granted to them under section 252 is not eviscerated. Since the harm we seek to remedy is entirely prospective, we believe that a forward-looking remedy will suffice.

We therefore leave the FCC's Ameritech Order untouched. However, we grant mandamus to enforce our mandate in order to disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated in paragraphs 280-297 of the Order.[8] We order the FCC to apply section 252(d)

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[8] The remedy we grant today is not unlike the remedy granted by the Fifth Circuit in *American Trucking Ass'ns*, 669 F.2d at 957. There the court issued mandamus in response to the Interstate Commerce Commission's (ICC's) continued application of a rule the Fifth Circuit had found to be invalid. There, as here, the agency had regulated beyond the scope of its statutory authority. Like the FCC in the case at hand, the ICC continued to impose the substance of the rule in various separate individual administrative adjudications, notwithstanding the mandate of the court of appeals. The Fifth Circuit granted petitioners' request that it issue a writ of mandamus ordering the ICC to "comply in all pending actions before it with the full scope of this Court's opinion." *Id.* at 960 (internal quotes omitted).

in the context of section 271 as our *Iowa Utils. Bd.* decision requires. In other words, we order the FCC to cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d). We order the FCC to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, inter-LATA services. The FCC has no authority under section 271(d)(3)(A) or section 271(d)(3)(C) to issue rules, regulations, orders, policy statements, or any other genre of opinions regarding how the local competition provisions of the Act involving interconnection, unbundled access, resale, or transport and termination of traffic should be priced.

The motions to enforce the mandate are granted.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

Excerpts from: *In The Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137 (FCC 1997):

F. Additional Concerns

280. Because we find that Ameritech has not demonstrated that it has fully implemented the competitive checklist with respect to OSS, interconnection, and 911 and E911 services, we need not decide in this Order whether Ameritech is providing the remaining checklist items.[734] Still, as stated above, in order to provide further guidance with respect to Ameritech's checklist compliance, we address here our concerns regarding certain other checklist items. We reiterate that we make no findings with respect to Ameritech's compliance with those items discussed herein.

1. Pricing of Checklist Items

281. We do not reach the question of whether Ameritech's pricing of checklist items complies with the requirements of section 271 given our findings

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[734] We note that Ameritech's compliance with section 271(c)(2)(B)(ii), its duty to provide nondiscriminatory access to unbundled network elements in accordance with sections 251(c)(3) and 252(d)(1), and section 271(c)(2)(B)(xiv), its duty to provide resale in accordance with sections 251(c)(4) and 252(d)(3), is discussed in the OSS section above. *See supra* Section VI.C. As we also discuss in that section, we have concerns about Ameritech's compliance with section 271(c)(2)(B)(iv), its duty to provide unbundled local loops. *See supra* para. 219.

above concerning Ameritech's failure to comply with the checklist on other grounds. Nonetheless, given that efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items, we believe it important to discuss our general concerns about pricing. Our hope is that this discussion will help expedite Ameritech's entry into long distance in Michigan and the entry of the other BOCs into the in-region interLATA market by providing more guidance as to what showing is required in future applications to demonstrate full compliance with the checklist. We hope that Ameritech will demonstrate compliance with the principles set forth below in its next application, and we urge the Department of Justice and the state commission to address Ameritech's showing on pricing of checklist items in the future.

282. Section 271(d) requires the Commission to determine that Ameritech has fully implemented the competitive checklist. The competitive checklist, in turn, requires the BOC to provide interconnection, access to unbundled network elements, transport and termination, and resale at prices that are "in accordance with" section 252(d).[735] Section 252(d) provides that rates for interconnection, unbundled network elements, and transport and termination must be cost-based.[736] Specifically as to interconnection and

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[735] 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiii), (xiv).

[736] *Id.* §§ 252(d)(1) ("Determination by a State commission of the just and reasonable rates" for interconnection and unbundled network elements "shall be . . . based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element . . ."); 252(d)(2) ("a State commission shall

unbundled network elements, section 252(d) provides that rates must be "based on the cost . . . of providing the interconnection or network element . . . and may include a reasonable profit."[737] Section 252(d)(3) provides that the price for resold service pursuant to section 251(c)(4) shall be based on "retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[738] The Act vests in the Commission the exclusive responsibility for determining whether a BOC has in fact complied with the competitive checklist.[739] In so doing, we must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination, and resale in accordance with the pricing requirements set forth in section 252(d) and, therefore, whether the BOC has fully implemented the competitive checklist.

283. We recognize that the Eighth Circuit has held that the Commission lacks jurisdiction to issue national rules establishing a methodology by which

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not consider the terms and conditions for reciprocal compensation to be just and reasonable unless . . . such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and . . . such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls").

[737] *Id.* § 252(d)(1).

[738] *Id.* § 252(d)(3).

[739] In making this determination, we are required to consult with the relevant state commission and the Department of Justice. *Id.* § 271(d)(2).

the states determine the rates for interconnection, unbundled network elements, resale, and transport and termination in state-arbitrated interconnection agreements pursuant to section 252.[740] The court, however, addressed the challenge to the Commission's pricing rules on jurisdictional grounds and expressly did not address the substantive merits of the Commission's rules. The court, therefore, made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based.

284. Because the Eighth Circuit concluded that the Commission lacked authority to prescribe a national pricing methodology to implement the requirements of section 252(d), if that decision stands, the meaning of section 252(d) ultimately will be determined through *de novo* review of state determinations by the federal district courts. The Act provides that parties aggrieved by state determinations under section 252 may sue in federal district court.[741] Consequently, the district courts will review numerous interconnection agreements from some, if not all, of the states and the District of Columbia.[742] The

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740 *Iowa Utils. Bd.* 1997 WL 403401.

741 *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section").

742 *See e.g., US WEST* v. *Jennings, et al.*, Civ. Nos. 97-0026, 97-0027 (D. Ariz. filed Jan. 7, 1997) (challenging, *inter alia*, Arizona commission's resale and transport and termination pricing determinations); *GTE v. Conlon, et al.*, Civ. No. 97-0061 (E.D. Cal. filed Jan. 31, 1997) (challenging, *inter alia*,

Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means. This litigation will take years, however, and inevitably will run the risk of impeding or significantly delaying the development of competition in the local exchange market, and, consequently, delaying the deregulation of the telecommunications markets that Congress envisioned.

California commission's use of forward looking cost methodology); *AT&T v. BellSouth, et al.*, Civ. No. 97-130 (N.D. Fla. filed April 18, 1997) (alleging, *inter alia*, state commission erred in not deaveraging prices for unbundled network elements); *AT&T v. U S WEST, et al.*, Civ. 97-917 (D. Minn. filed April 16, 1997) (same); *Southwestern Bell Telephone Col. v. McKee, et al.*,Civ. No. 97-2197 (D. Kan. filed April 11, 1997) (challenging, *inter alia*, state commission's resale price discount); *Southwestern Bell Telephone v. Zobrist, et al.*, Civ. No. 97-0140 (W.D. Mo. filed Feb. 6, 1997) (alleging, *inter alia*, state commission improperly relied on TELRIC methodology); *MCI Telecommunications Corp. v. Southwestern Bell Telephone Co., et al.*, Civ. No. 97-132 (W.D. Tex. filed Feb. 28, 1997) (alleging, *inter alia*, state commission erred in not using forward looking cost methodology). GTE has filed suits in numerous states, including Michigan, alleging, *inter alia*, that the rates established by state commissions in arbitrations for unbundled network elements and interconnection improperly preclude GTE from recovering historical costs. *See, e.g., GTE v. Strand, et al.*, Civ. No. 97-20 (W.D. Mich. filed Feb 25, 1997); *GTE v. Johnson et al.*, Civ. No. 4:97CV26 (N.D. Fla. filed Jan. 31, 1997); *GTE v. Naito, et al.*, Civ. No. 97-00162 (D. Haw. filed Feb. 14, 1997); *GTE v. Miller, et al.*, Civ. No. 96-1584 (C.D. Ill. filed Dec. 19, 1996); *GTE v. Mortell, et al.*, Civ. No. 97-0066 (N.D. Ind. filed Feb. 20, 1997); *GTE v. Breathitt, et al.*, Civ. No. 97-7 (E.D. Ky. filed Jan. 29, 1997); *GTE v. Zobrist, et al.*, Civ. No. 97-0193 (W.D. Mo. filed Feb. 19, 1997).

285. While the question of what constitutes cost-based pricing under section 252(d) wends it[s] way through the courts, the Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard. The BOCs will file section 271 applications in the meantime, and the Commission is obligated by section 271 to issue a written determination approving or denying the authorization requested not later than 90 days after receiving an application.[743]

286. The cost-based standard is contained in a federal statute. It is, therefore, presumed to have a uniform meaning nationwide.[744] As the Supreme Court has often stated, "federal statutes are generally intended to have uniform nationwide application."[745] Moreover, there is nothing in section 271 to suggest that the Commission's bases for determining

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[743] 47 U.S.C. § 271(d)(3).

[744] *See, e.g., U.S. v. Phipps*, 68 F.3d 159, 161 (7th Cir. 1995) ("Language in federal statutes and regulations usually has one meaning throughout the country").

[745] *See, e.g., Mississippi Bank of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citations omitted); *see also Jerome v. United States*, 318 U.S. 101, 104 (1943). Occasionally, the federal courts have concluded that an ambiguous federal statutory term was to be given meaning by reference to state law. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946). But that approach has been applied only in cases in which the ambiguous federal statutory term is a familiar state law term with a history of state law jurisprudence interpreting it. Indeed, it is only in such cases that the issue of national uniformity is even raised; in all other cases involving ambiguous federal statutory terms, national uniformity is simply taken for granted. The general rule plainly applies here.

checklist compliance should be vary throughout the country. The Commission, pursuant to its responsibility under section 271, therefore must apply uniform principles to give content to the cost-based standard in the competitive checklist for each state-by-state section 271 application.

287. Such a reading of our responsibilities under section 271 is also sound policy. Determining cost-based rates has profound implications for the advent of competition in the local markets and for competition in the long distance market. Because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit efficient entry. That would be the case, for example, if such prices included embedded costs. Moreover, allowing a BOC into the in-region inter-LATA market in one of its states when that BOC is charging noncompetitive prices for interconnection or unbundled network elements in that state could give that BOC an unfair advantage in the provision of long distance or bundled services.

288. We believe that Congress did not intend us to be so constrained in conducting our prescribed assessment of checklist compliance in section 271. We conclude that Congress must have intended the Commission, in addressing section 271 applications, to construe the statute and apply a uniform approach to the phrase "based on cost" when assessing BOC compliance with the competitive checklist. We will consider carefully the state commission's assessment of pricing contained in its checklist compliance verification, the methodology used to derive prices for

checklist items, and the allegations of interested parties in the section 271 proceeding. It is our understanding that a large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches. Our ultimate objective, for the purpose of section 271 compliance, is to determine whether the BOC's prices for checklist items in fact meet the relevant statutory requirements. We note, moreover, that even if it were decided that we lacked authority to review BOC prices as an aspect of our assessment of checklist compliance under section 271(d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C). We discuss below our conclusions concerning the appropriate pricing for these checklist items.

289. *TELRIC-Based Pricing of Interconnection Services, Unbundled Network Elements, and Transport and Termination.* In ascertaining whether a BOC has complied with the competitive checklist regarding pricing for interconnection, unbundled network elements, and transport and termination pursuant to section 251, it is critical that prices for these inputs be set at levels that encourage efficient market entry. New entrants should make their decisions whether to purchase unbundled elements or to construct facilities based on the relative economic costs of these options. New entrants cannot make such decisions efficiently unless prices for unbundled elements are based on forward-looking economic costs. Similarly, prices for interconnection and transport and termination must be based on forward-looking economic costs in order to encourage efficient entry. In order for competition to drive retail prices

to cost-based levels, as occurs in efficient, competitive markets, new entrants must be able to purchase interconnection services, unbundled network elements, and transport and termination at rates that reflect forward-looking costs. Adopting a pricing methodology based on forward-looking costs best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent to engage in anticompetitive behavior, permits new entrants to take advantage of the incumbent's economies of scale, scope, and density, and encourages efficient market entry and investment by new entrants. We conclude, therefore, that a BOC cannot be deemed in compliance with sections 271(c)(2)(B)(i), (ii), and (xiii) of the competitive checklist unless the BOC demonstrates that prices for interconnection required by section 251, unbundled network elements, and transport and termination are based on forward-looking economic costs.

290. We have previously set forth our view that the requirement for the use of foward-looking economic costs is to be implemented through a method based on total element long-run incremental cost or TELRIC. TELRIC principles ensure that the prices for interconnection and unbundled network elements promote efficient entry decisions. Pursuant to TELRIC principles, prices for interconnection and unbundled network elements recover the forward-looking costs over the long run directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs.[746] TELRIC

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[746] Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a rea-

pricing also specifically provides for a reasonable profit.[747] We conclude that, for purposes of checklist compliance, prices for interconnection and unbundled network elements must be based on TELRIC principles. We emphasize, however, that it is not the label that is critical in making our assessment of checklist compliance, but rather what is important is that the prices reflect TELRIC principles and result in fact in reasonable, procompetitive prices. It is our understanding that the large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches. For instance, the principles that the Michigan PSC applied in its recent decision on permanent prices for interconnection appear to be fully consistent with TELRIC principles.[748]

291. We recognize that use of TELRIC principles will necessarily result in varying prices from state to state because the parameters of TELRIC may vary from state to state. Costs may vary, for example, due to differences in terrain, population density, and labor

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sonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). The determination of "additional costs" of transport and termination must also be based on TELRIC principles.

[747] TELRIC includes what is called "normal" profit, which is the total revenue required to cover all of the costs of a firm, including its opportunity costs. The concept of normal profit is embodied in forward-looking costs because the forward-looking costs of capital, that is, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit.

[748] *See Michigan Rate Proceeding. See also, supra* note 152.

costs from one state to the next. TELRIC principles will not generate the same price in every state; indeed it will not even generate the same formula for pricing in every state. But such principles are fair and procompetitive and should create even opportunities for entry in every state, while permitting, indeed obliging, each state commission to determine prices on its own.[749] In order for us to conduct our review, we expect a BOC to include in its application detailed information concerning how unbundled network element prices were derived.

292. Establishing prices based on TELRIC is a necessary, but not sufficient, condition for checklist compliance. In order for us to conclude that sections 271(c)(2)(B)(i) and (ii) are met, rates based on TELRIC principles for interconnection and unbundled network elements must also be geographically deaveraged to account for the different costs of building and maintaining networks in different geographic areas of varying population density. Deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Deaveraging should, therefore, lead to increased competition and ensure that competitors make efficient

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[749] We note that Ameritech states that its arbitrated rates for unbundled network elements, interconnection, local transport and termination, and collocation, "are, in fact, lower than a conservative estimate of forward-looking economic costs determined in accordance with the Commission's now-stayed pricing rules." *See* Ameritech Application at 35 n.37. As we previously indicated, we urge the Michigan Commission and the Department of Justice to address Ameritech's compliance with TELRIC principles when Ameritech refiles its application.

entry decisions about whether they will use unbundled network elements or build facilities.

293. There also must be "just and reasonable" reciprocal compensation for the transport and termination of calls between an incumbent's and a new entrant's network.[750] In order for us to find that the statutory standard has been met for section 271(c)(2)(B)(xiii), the rates not only must be based on TELRIC principles, but new entrants and BOCs must also each be compensated for use of the other's network for transport and termination.

294. Finally, we believe that it is important to our assessment of checklist compliance to know the basis for the prices submitted by the BOC in the application. In particular, we would want to know whether those prices were based on completed cost studies, as opposed to interim prices adopted pending the completion of such studies.

295. *Pricing for Resold Services.* We conclude that a BOC cannot demonstrate compliance with the competitive checklist unless it has appropriate rates for resale services, which the Act defines as "wholesale rates [based on] retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[751] Accordingly, resellers should not be required to compensate a BOC for the cost of services, such as marketing, that resellers perform. Moreover, just as recurring wholesale rates should not reflect reasona-

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750 *See* 47 U.S.C. § 252(d)(2).

751 *Id.* § 252(d)(3).

bly avoidable costs, neither should non-recurring charges associated with the service being resold reflect costs that would be reasonably avoidable if the BOC were no longer to offer the service on a retail basis. We will not consider a BOC to be in compliance with section 271(c)(2)(B)(xiv) of the competitive checklist unless the BOC demonstrates that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs.

296. *Non-recurring Charges.* Unreasonably high non-recurring charges for unbundled loops and other essential inputs can have as much of a chilling effect on local competition as unreasonably high recurring fees. Both types of charges must be cost-based in order for local competition to take root and flourish. Non-recurring charges may be assessed in the provision of unbundled network elements and interconnection (in providing collocation, for example), and in the provision of resale. Consequently, we conclude that a BOC will not be deemed in compliance with sections 271(c)(2)(B)(i),(ii) and (xiv) of the competitive checklist unless it has shown that its non-recurring charges reflect forward-looking economic costs.[752]

297. *Continuing Compliance.* We must be confident that a BOC will continue to comply with the

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[752] With regard to non-recurring charges associated with services made available for resale, charges that have a retail eqivalent are to be priced based on the avoided cost standard in section 252(d)(2) as discussed in the preceding paragraph. Non-recurring charges associated with resale that have no retail equivalent, *e.g.*, development of billing systems for resellers, however, should be based on forward-looking economic costs as discussed in this paragraph.

pricing requirements contained in the competitive checklist after it has been authorized to provide in-region interLATA service. We anticipate, therefore, that it may be necessary to require, as a condition of authorization, that the BOC continue to price interconnection, unbundled network elements, transport and termination, and resold services in accordance with the competitive checklist as we have described above if it wishes to remain in the long distance market. Imposition of such conditions may be particularly important where we anticipate continuing negotiations with individual carriers over pricing terms and conditions such as non-recurring charges. We believe that we have authority to impose such conditions pursuant to sections 271(d)(6) and 303(r) of the Communications Act.[753]

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[753] 47 U.S.C. §§ 271(d)(6), 303(r); *see also infra*, Section IX (discussing the Commission's authority to impose conditions).

APPENDIX C

Section 271 of the Communications Act of 1934, 47 U.S.C. 271, provides:

BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.

(a) GENERAL LIMITATION.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA SERVICES TO WHICH THIS SECTION APPLIES.—

(1) IN-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) OUT-OF-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) INCIDENTAL InterLATA SERVICES.—A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) TERMINATION.—Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) REQUIREMENTS FOR PROVIDING CERTAIN IN-REGION interLATA SERVICES.—

(1) AGREEMENT OR STATEMENT.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this

subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) FAILURE TO REQUEST ACCESS.—A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) SPECIFIC INTERCONNECTION REQUIREMENTS.—

(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell

operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service cus-

tomers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) ADMINISTRATIVE PROVISIONS.—

(1) APPLICATION TO COMMISSION.—On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for

authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) CONSULTATION.—

(A) CONSULTATION WITH THE ATTORNEY GENERAL.—The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) CONSULTATION WITH STATE COMMISSIONS.—Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) DETERMINATION.—Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) LIMITATION ON COMMISSION.—The Commission may not, by rule or otherwise, limit or extend

the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) ENFORCEMENT OF CONDITIONS.—

(A) COMMISSION AUTHORITY.—If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) RECEIPT AND REVIEW OF COMPLAINTS.—The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) LIMITATIONS.—

(1) JOINT MARKETING OF LOCAL AND LONG DISTANCE SERVICES.—Until a Bell operating company is authorized pursuant to subsection (d)

of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA TOLL DIALING PARITY.—

(A) PROVISION REQUIRED.—A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) LIMITATION.—Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) EXCEPTION FOR PREVIOUSLY AUTHORIZED ACTIVITIES.—Neither subsection (a) of this

section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) DEFINITION OF INCIDENTAL InterLATA SERVICES.—For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) LIMITATIONS.—The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this sec-

tion by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) ADDITIONAL DEFINITIONS.—As used in this section—

(1) IN-REGION STATE.—The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) AUDIO PROGRAMMING SERVICES.—The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) VIDEO PROGRAMMING SERVICES; OTHER PROGRAMMING SERVICES.—The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

(j) CERTAIN SERVICE APPLICATIONS TREATED AS IN-REGION SERVICE APPLICATIONS.—For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

APPENDIX D

Section 402 of the Communications Act of 1934, 47 U.S.C. 402 (Supp. II 1996), provides, in pertinent part:

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.